

GAHC010215122019



2024:GAU-AS:9460

IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WP(C) No. 6740/2019

Jyotshna Rani Saha@Jyotsna Rani
W/O Labu Saha,
Resident of Village-Barpeta Road Town,
P.S. Barpeta Road, Ward No. 3,
District-Barpeta, Assam,
Mouza-Gobardhana.

.....Petitioner

-Versus-

1. The Union of India,
Represented by the Secretary Ministry of Home
Affairs, New Delhi-110001.
2. The State of Assam,
Represented by the Home Secretary to the
Government of Assam, Dispur, Guwahati-5.
3. Election Commission of India,
Nirvachan Sadan, Ashoka Road,
New Delhi, India Pin - 110001.

4. Office of the State Co-ordinator of National Registration (NRC), Assam,
1st Floor, Achyut Plaza, Guwahati-Shillong Road,
Bhangagarh, Guwahati, Assam, 781005.
5. The Deputy Commissioner, Barpeta,
District- Barpeta, Assam,
Pin- 781301.
6. The Superintendent of Police(Border),
Barpeta, District-Barpeta, Assam.

.....Respondents

For Petitioner : Mr. A. Dasgupta, Senior Advocate
Ms. B. Das, Advocate
For Respondent(s) : Ms. A. Gayan, CGC
Mr. J. Payeng, SC, Home Department
Mr. P. Sharma, Sr, Govt. Advocate
Mr. A. I. Ali, SC, ECI

Date of Judgment & Order : 20.09.2024

BEFORE
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT AND ORDER (CAV)

(MRIDUL KUMAR KALITA, J)

1. Heard Mr. A. Dasgupta, learned Senior Counsel, assisted by Ms. B. Das, learned Counsel, appearing for the petitioner. Also heard Ms. A. Gayan, learned Central Government Counsel, for the respondent No. 1. Also heard Mr. J. Payeng, learned Standing Counsel, Home Department, Assam, for respondent Nos. 2 and 6;

and Mr. A. I. Ali, learned Standing Counsel, Election Commission of India, for Respondent No. 3. Also heard Mr. P. Sharma, learned Additional Senior Government Advocate, Assam, for respondent No. 5.

- 2.** This writ petition has been filed under Article 226 of the Constitution of India, by the petitioner Jyotshna Rani Saha @ Jyotsna Rani, impugning the judgment and order dated 28.05.2018, passed in F.T. 9th (Bar) Case No.408/2015, by the learned Member, Foreigners' Tribunal, (9th), Barpeta, Assam, whereby the petitioner has been declared as a foreigner under the Foreigners Act, 1946, who had illegally entered into India (Assam) on or after 25.03.1971.
- 3.** Earlier on 17.12.2019, the Court called for the records of said Foreigners' Tribunal Case from the concerned Tribunal.
- 4.** On perusal of the record, we have seen that having reasonable doubt that the petitioner is an illegal migrant, the Superintendent of Police (Border), Barpeta, had made a reference referring the doubtful Case No. 6738(A) to the Illegal Migrant Determination Tribunals, Barpeta, for determining as to whether the petitioner Jyotshna Rani Saha was an illegal migrant. Under Section 3 (1)(C) of the Illegal Migrants(Determination by Tribunals) Act, 1983, (hereinafter referred to as "the IM(D)T Act"), an illegal migrant was defined as a foreigner who had unauthorizedly entered into

India after 25.03.1971.

5. As the IM(D)T Act was declared unconstitutional by the Hon'ble Supreme Court of India in the case of "**Sarbananda Sonowal v. Union of India**", reported in **(2005) 5 SCC 665**," with the further direction that the references which were pending before the Tribunal constituted under IM(D)T Act should be transferred to the Tribunal constituted under Foreigners Act, 1946, read with the Foreigners (Tribunals) Order, 1964, consequently, the related reference was transferred to the Foreigners Tribunal No. 2, Barpeta. Thereafter, the said case was transferred to the Foreigners' Tribunal, (9th), Barpeta, Assam, and Case No. F.T. 9th (BPT) Case No. 408/2015 was registered.
6. It appears from the records of F.T. 9th (Bar) Case No. 408/2015 that the petitioner appeared before the learned Tribunal and on 29.11.2016 had filed her written statement claiming therein that she is not a foreigner, but a citizen of India by birth.
7. In her written statement, the petitioner has stated that, she was born in the year 1952 in the village Mandia Gaon under Baghbar police station in the then Kamrup District of Assam and she was brought up in the said village. She has stated that she lost her parents, namely, Dinesh Chandra Saha (father) and Swarabala Saha (mother), in her childhood. It is further stated in her written statement that, after the death of her parents, she shifted to the

house of her maternal uncle at village Mandia Gaon under Baghbar police station and she was looked after and was brought up in her maternal uncle's house, along with her brothers and sisters. She has also stated that as her parents had died before the year 1965 so that their names could not appear in the voter list of 1965 onwards. She has also stated in her written statement that her brother Ramendra Saha is a citizen of India and his name was duly entered in the voter list of 1966, in respect of No. 52 Baghbar Legislative Assembly Constituency under the then Kamrup District. She has also stated that her brother's name was also reflected in the voter list of 1970 in respect of No. 52 Baghbar Legislative Assembly Constituency. She has also stated that in the year 1970 she got married to one Labu Saha of Barpeta road Ward No. 3 under Barpeta Road Police Station in the District of Barpeta. She has also stated that her name along with the name of her husband was reflected in the voter list of 1985 and 1989 in respect of No. 40 Sarbhog Legislative Assembly Constituency under Barpeta District. She has also stated that the Gaonbura of Mandia Gaon village, Charge No. 10 had issued a certificate on 17.08.1993 to the effect that the petitioner is the sister of Ramendra Saha, son of late Dinesh Chandra Saha.

- 8.** In support of the averments made by the petitioner in her written statement, she has adduced her evidence on affidavit as DW-1. She has also adduced evidence of one Ramendra Saha as DW-2,

whom she had projected as her brother.

- 9.** In her evidence on affidavit, the petitioner as DW-1 has reiterated the facts which she had stated in her written statement. She exhibited following documents before the Tribunal while deposing as DW-1:-(a) Exhibit-A: Voter List of 1966, (b) Exhibit-B : Voter List of 1970, (c) Exhibit-C :Voter List of 1985, (d) Exhibit-D: Certificate issued by Gaon Panchayat Secretary,(e) Exhibit-E : Certificate issued by village headman (Gaonburha).
- 10.** During her cross-examination, DW-1 has stated that when her age was 10 years, her father Dinesh Chandra Saha had expired and after about two years of death of her father, her mother also expired. She has also stated that the name of her grandfather is Digambar Saha. However, she does not know the name of her grandmother. She has also deposed that her father had landed property at Mandia. However, she has not deposited any land documents to that effect. She has also deposed that she was married about 50 years ago and her husband had expired about six years ago.
- 11.** In his evidence on affidavit, DW-2, Ramendra Saha has deposed that the petitioner is her younger sister and she was born and brought up at village Mandia Gaon, under Baghbar Police Station of the then Kamrup District. He has also deposed that he lost his parents in his childhood. He has deposed that they were

permanent residents of village Mandia Gaon under Baghbar Police Station. However, after the death of his parents, he along with his brothers and sisters had shifted to the house of his maternal uncle at Mandia Gaon and were brought up in his maternal uncle's house. He has also stated that his parents had two sons including him. The name of the other son is Bhaduri Saha and three daughters, namely, Golapi Saha, Jyotsna Rani Saha and Usha Saha. He has also exhibited all the documents which were exhibited by the DW-1 and in addition to that he also exhibited a copy of his electoral photo identity card, as Exhibit-G.

- 12.** During cross-examination, he has deposed that he does not remember the name of his grandparents. He has also deposed that he is not aware about the residence of his parent's father. He has also deposed that he and his siblings were brought up in the residence of his maternal uncle, namely, Jyotindra Saha at Mandia. He has also stated that he is ignorant about from where his father had come and to which place he originally belonged to. He also deposed that the petitioner has two sons and three daughters and her husband had expired about five to six years ago.
- 13.** Mr. A. Dasgupta, learned Senior Counsel for the petitioner, has submitted that in the instant case, there is total non-application of mind on the part of learned Tribunal in issuing notice to the petitioner on receipt of reference by the Superintendent of Police

(Border), Barpeta, as the complaint of the Electoral Registration Officer as well as the report of the Local Verification Officer, did not specifically mention the stream of entry of the petitioner as illegal migrant from the specified area. He has submitted that Clause 15 of the verification report of the Local Verification Officer regarding whether the petitioner migrated into Assam and Clause 16 of the report regarding the stream of which the petitioner is suspected to be foreigner has been left blank. He therefore submits that there was no endeavour made by the Local Verification Officer to prepare a proper verification report and the reference was thus made whimsically and without proper application of mind.

- 14.** The learned Senior Counsel for the petitioner cited a ruling of this Court in the case of **"H.R.A. Choudhury v. Election Commission of India and others** reported in **2002 (1) GLT1**". He has submitted that in the said case the High Court while referring to a communication dated 17.07.1997 has discussed the instructions issued by the Election Commission of India which provide as to how, in the cases of person whose citizenship is in doubt, are to be referred to the Tribunal for determination of their citizenship. It was mentioned in Paragraph Nos. 3.8 and 3.9 of the said communication as follows:-

"3.8 The Electoral Registration Officer shall, on receipt of

the verification reports from the Local Verification Officers, consider the same. Where he is satisfied, on such report and such other material/information as may be available to him, about the eligibility of the person, he shall allow his name to continue on the roll and include it in the final roll. Where, however, he is not so satisfied and has reasonable doubt about the citizenship of any person, he shall refer all such doubtful cases to the competent authority under the Illegal Migrants (Determination by Tribunals) Act, 1983 or the Foreigners Act, 1946, as the case may be. For the convenience of the Electoral Registration Officer, the Commission has devised a proforma (Annexure-‘B’) for making such reference which shall be adopted by all the Electoral Registration Officers. While making such a reference, the Electoral Registration Officer shall also furnish to the Competent authority all documentary evidence collected during the process of verification (including the local verification report) pertaining to the person concerned, and also inform the person concerned of his case having been referred by him to the competent authority.

3.9 After the case of a person has been referred by the Electoral Registration Officer to the competent authority as aforesaid, he shall wait for a decision of the relevant Tribunal in relation to that person and act according to such decision.”

15. The learned Senior Counsel for the petitioner also cited the ruling

of this Court in the case of “***The State of Assam and Others v. Moslem Mondal and Others*** reported in **2013(1) GLT 809**”, wherein it was observed that the reference by the Referral Authority cannot be mechanical. The Referral Authority has to apply his mind on the materials collected by the Investigating Officer during investigation and make reference on being satisfied that there are grounds for making such reference. However, in the instant case, the learned Senior Counsel for the petitioner has submitted that the Referral Authority has not applied his mind and in spite of incomplete verification report of the Local Verification Officer, the Tribunal had issued notice to the petitioner on receipt of the reference by the Superintendent of Police (Border), Barpeta.

- 16.** The learned Senior Counsel for the petitioner has submitted that the learned Tribunal has to *prima facie* satisfy itself about the main grounds before issuance of notice to the proceedee. However, in the instant case, no such satisfaction has been recorded while issuing notice to the proceedee. Hence, he submits that the issuance of notice to the proceedee and initiation of a proceeding, under Foreigners Act, 1946 against her was bad in law.
- 17.** The learned Senior Counsel for the petitioner has also submitted that the finding of the learned Tribunal is also perverse to the extent that it ignored the evidence of DW-2, who is the projected

brother of the petitioner, and who has categorically stated in his testimony that the petitioner is her sister.

18. The learned Senior Counsel for the petitioner has also submitted that the petitioner and her brother, i.e. DW-2 were brought up by their maternal uncle after the death of their parents and the petitioner's brother is a citizen of India whose name figured in the voter list of 1966 and 1970 and the said facts were not taken into consideration by the learned Tribunal while arriving at the finding that the petitioner is not a citizen of India.
19. The learned Senior Counsel for the petitioner also cited the ruling of the Hon'ble Supreme Court of India in the case of "***Central Council for Research in Ayurvedic Sciences and Another v. Bikartan Das and others***", reported in ***2023 SCC Online SC 996***", wherein the Apex Court has observed that though the High Court does not exercises the power of appellate tribunal while considering for grant of a Writ of Certiorari, however, if it considers the order under consideration to be without jurisdiction or if there is an error apparent on the face of record, the Court may exercise its Writ jurisdiction for issuing the Writ of Certiorari.
20. The learned Senior Counsel for the petitioner has submitted that in the instant case non-consideration of relevant evidence on record amounted to perversity on the part of the learned Tribunal in arriving at a decision that the petitioner is not a citizen of India,

therefore, a Writ of Certiorari may be issued for quashing the impugned Opinion/Order.

- 21.** On the other hand, Mr. J. Payeng, learned Standing Counsel, Home Department, Assam, has submitted that under Section 9 of the Foreigners Act, 1946, the onus of proving citizenship of a person is on that person who claims to be a citizen of India, and for doing so, first he or she has to disclose all the material facts in his or her written statement filed before the Tribunal.
- 22.** The learned Standing Counsel, Home Department, Assam, has submitted that in the instant case, the petitioner has not disclosed as to when her parents came to India or from where they originally belong to. She has only claimed that DW-2 Ramendra Saha is her brother who is a citizen of India.
- 23.** The learned Standing Counsel, Home Department, Assam, has submitted that the lineage of a person is ascertained through his or her parents only and not through the brother. He submits that the petitioner has failed to show any link document regarding her claim that Mr. Ramendra Saha is her projected brother. He further Submits that even if it is assumed that said Ramendra Saha is her brother, it may not help the petitioner as the brother may come to India prior to 1971, however, that does not mean that the petitioner also came to India prior to 1971, along with her brother. He has submitted that though the petitioner has

exhibited the certificate issued by Gaonbura to claim that said Ramendra Saha is her projected brother, however, the said certificate was neither exhibited by the person who had issued the said certificate nor proved by him, i.e., the Gaonbura himself, and therefore, though exhibited, the said certificate cannot be regarded as duly proved and hence he submits that the Tribunal was right in discarding the said certificate.

24. The learned Standing Counsel, Home Department, Assam, has submitted that from the evidence adduced by the petitioner or from the evidence of DW-2, it cannot be established that the parents of the petitioner were the citizens of India and were inhabitants of Assam prior to 1971.
25. The learned Standing Counsel, Home Department has submitted that in cases involving the question of proving one's citizenship, it is a settled position of law that oral evidence alone is not enough to prove one's citizenship, it must be supported by cogent, admissible and relevant documentary evidence. In support of his submission, learned Standing Counsel, Home Department, Assam, has cited rulings of this court in the case of ***Nur Begum v. Union of India***, [WP(C) No. 1900/2019], and the case of ***Asia Begum v. Union of India***, [WP(C) No. 4020/2017].
26. The learned Standing Counsel, Home Department, Assam, has also submitted that the reference to a Foreigners Tribunal may be

made by the competent authority, namely, Superintendent of Police (Border), on the basis of either a police inquiry or on the basis of a reference by Electoral Registration Officer, and in the instant case, it was on the basis of a reference made by Electoral Registration Officer through the Superintendent of Police (Border), Barpeta.

27. Learned Standing Counsel, Home Department, Assam, has submitted that in the instant case, the petitioner had failed to produce any document before the Local Verification Officer to prove in support of her claim for citizenship, and therefore, the Electoral Registration Officer, in this case, was not satisfied regarding the claim of citizenship by the petitioner, and hence he rightly referred the matter through the competent authority to the Illegal Migrant Determination Tribunals, Barpeta, for an opinion regarding the citizenship of the petitioner.
28. The learned Standing Counsel, Home Department, Assam, has also submitted that in the instant case, after setting aside the Illegal Migrants (Determination by Tribunals) Act, 1983, by the Hon'ble Supreme Court of India, in the case of "**Sarbananda Sonowal v. Union of India**(supra), all the cases pending before the Tribunals under the Illegal Migrants (Determination by Tribunals) Act, 1983, were transferred to the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 and were decided in the manner provided in the Foreigners Act, rules made thereunder

and the procedure prescribed under the Foreigners (Tribunals) Order, 1964.

- 29.** The learned Standing Counsel, Home Department has submitted that after transfer of the case from Illegal Migrant Determination Tribunals, Barpeta, to the Foreigners Tribunal Barpeta No. 2, the reference in the instant case would be deemed to be a reference made under Section 2 (1) of the Foreigners (Tribunals) Order, 1964, where there is no requirement of any inquiry by Local Verification Officer.
- 30.** The learned Standing Counsel, Home Department, Assam has also deposed that in a case where the Court is exercising its Writ jurisdiction for issuance of Writ of Certiorari, the powers of the Court are limited and it cannot issue Writ of Certiorari on the petitioner mere asking for the same. He submits that in the instant case, there is no jurisdictional error on the part of the Tribunal, neither there is any error apparent on the face of the record. Hence, he submits that this is not a fit case which justifies interference by this Court in exercise of its Writ jurisdiction and therefore, he prays for dismissing the writ petition.
- 31.** We have considered the submissions made by learned counsel for both the sides. We have also gone through the case record of F.T. 9th (Bar) Case No. 408/2015. We have also gone through the rulings cited by learned counsel for rival parties in support of their

submissions.

- 32.** In the case of "***Central Council for Research in Ayurvedic Sciences and Another v. Bikartan Das and others*** (supra), the Hon'ble Supreme Court of India has observed as follows:

"The first cardinal principle of law that governs the exercise of extraordinary jurisdiction under Article 226 of the Constitution, more particularly when it comes to the issue of a writ of certiorari is that in granting such a writ, the High Court does not exercise the powers of Appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The writ of certiorari can be issued if an error of law is apparent on the face of the record. A writ of certiorari, being a high prerogative writ, should not be issued on mere asking."

- 33.** In the case in hand, learned Senior Counsel for the petitioner has submitted that the report of the Local Verification Officer, on the basis of which the reference was made in this case, is not complete as it has left column Nos. 15 and 16 of the Annexure-A, (form for verification officer's report) blank. It has also not mentioned in column No. 16 as to from which place the petitioner is suspected to have migrated to Assam. Neither any stream

during which such a migration had occurred has been mentioned in the form and therefore, the Electoral Registration Officer was at fault in referring the matter to the Competent Authority. However on perusal of the Annexure-B, i.e. the communication dated 01.12.1997 made by the Electoral Registration Officer No. 40 Sarbhog Legislative Assembly Constituency to the Competent Authority, i.e. Superintendent of Police (Border), Barpeta, it appears that during house to house enumeration done during the period 16th January 1997 to 15th April 1997, the name of the petitioner was included within the draft electoral roll. However, when the Electoral Registration Officer had doubt regarding citizenship of the petitioner, he referred the matter to Local Verification Officer for a local verification and the petitioner could not produce any document before the Local Verification Officer regarding her citizenship, therefore, the Electoral Registration Officer had forwarded the matter to the Competent Authority for referring the same to the Illegal Migrant Determination Tribunals, for deciding the question as to whether the petitioner is Indian citizen or not.

- 34.** On perusal of the guidelines contained in Paragraph No. 3.8 in the communication dated 17.07.1997 of the Election Commission to the Chief Electoral Officer Assam, which is referred hereinabove in Paragraph No. 9 of the judgment, it is for the Electoral Registration Officer to consider the report of the Verification

Officer and if he is satisfied on such a report regarding the eligibility of a person for inclusion of his or her name in the electoral roll the name of such a person may continue on the electoral roll and shall be included in the final electoral roll. However, if the Electoral Registration Officer is not satisfied or has a reasonable doubt about the citizenship of any person, he shall refer such doubtful cases to the Competent Authority.

- 35.** In the instant case, it appears that no document was produced by the petitioner before the Local Verification Officer, therefore, in the report of the Local Verification Officer, it has been mentioned that no evidence has been produced by the petitioner. Therefore, we are of the considered opinion that the Electoral Registration Officer of No. 40 Sarbhog Legislative Assembly Constituency was not wrong in forwarding the matter to the competent authority for referring the matter to the Illegal Migrant Determination Tribunals, under the IM(D)T Act during its force, for determination of the citizenship status of the petitioner and for the same reasons, the Tribunal after receipt of reference from the Competent Authority, was also not at fault in issuing the notice to the petitioner, as no material was available before the Tribunal at that point of time from where it can be ascertained that the petitioner is a citizen of India.

- 36.** For discharging the burden under Section 9 of the Foreigners Act, 1946, the petitioner shall have to prove that either she herself

came to India or that she was there in India prior to 25th March 1971 and thereafter continuously residing in India or she has to prove that her parents resided in India prior to the said date and they were citizens of India. However, in the instant case, though the petitioner has claimed that she was born in the year 1952 in the village Mandia Gaon under Baghbar Police Station of the then Kamrup District of Assam, but no documentary proof has been adduced by the petitioner to prove the said fact. The petitioner has also failed to prove any documentary evidence to show that her parents were citizens of India. In the instant case, the petitioner has tried to project one Ramendra Saha as her brother and has claimed that he is a citizen of India and on that basis she had also claimed to be citizen of India. However, the linkage with brother who happens to be citizen of India even if it is assumed for the sake of argument may not be sufficient to prove one's citizenship. In this regard the submissions made by learned Standing Counsel, Home Department, Assam appears to be acceptable that even if the projected brother is deemed to be a citizen of India and assumed to have come to India prior to 25.03.1971, however, there is no evidence on record to show that the petitioner also accompanied her brother and she also came to India prior to 1971. As the petitioner has not been able to prove that she has been born to Indian citizens, therefore, her case cannot be regarded as a case of citizenship by birth.

- 37.** Moreover, it also appears that though the petitioner has exhibited Exhibit-E, i.e. the certificate issued by Gaonbura, however, the said Gaonbura has himself not adduced his evidence and the said Exhibit-E was also not proved by the person who had issued it, therefore, same is not admissible in evidence. After discarding Exhibit-E, what remains is only the oral testimony of DW-1 and DW-2, wherein, it has been deposed that the petitioner is the sister of the said Ramendra Saha. However, this Court has held in the case of *Nur Begum v. Union of India*(supra) as well as in the case of *Asia Begum v. Union of India*(supra) that in a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964, the evidentiary value of oral testimony without the support of documentary evidence is wholly insignificant and such an oral testimony alone is no proof of citizenship.
- 38.** In view of above, we are of the considered opinion that the learned Tribunal was right in discarding the oral testimony of DW-1, i.e., the petitioner as well as DW-2, i.e., her projected brother Ramendra Saha. The petitioner has miserably failed to prove that her parents were Indian citizens. She has also miserably failed to prove her linkage with DW-2 Ramendra Saha, who she had claimed to be an Indian citizen. Thus, on the basis of materials available on record we are of the considered opinion that the impugned Opinion/Order was passed by the learned Tribunal

after due consideration of available materials on record. We do not find any infirmity in the findings and the impugned Opinion dated 28.05.2018, rendered by the learned Foreigners' Tribunal, (9th), Barpeta, in Case No. 408/2015. We, accordingly uphold the said impugned order dated 28.05.2018, by invoking the Writ jurisdiction of this Court.

- 39.** Accordingly, the writ petition stands dismissed being devoid of merit.
- 40.** Return the case record of F.T. 9th (Bar) Case No. 408/2015 to the Foreigners Tribunal, (9th), Barpeta, along with a copy of this judgment.
- 41.** Let also, the concerned Deputy Commissioner, Barpeta as well as Superintendent of Police (Border), Barpeta be provided with copy of this judgment for their necessary use.

JUDGE

JUDGE

Comparing Assistant